UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MICHELE VON KELSCH, Appellant, v. DEPARTMENT OF LABOR, Agency.	DOCKET NUMBER DC-1221-90-0525-M-1 DATE: NOV 10 1993

William Bransford, Esquire, Shaw, Bransford & O'Rourke, Washington, D.C., for the appellant.

Sheila K. Cronan, Esquire, Washington, D.C., for the agency.

BEFORE

Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member

OPINION AND ORDER

The United States Court of Appeals for the Federal Circuit remanded this case upon the Board's motion for voluntary remand so that the Board could reconsider its November 25, 1991, Opinion and Order dismissing this appeal for lack of jurisdiction. Upon reconsideration and for the reasons set forth below, we AFFIRM the November 25, 1991, Opinion and Order as MODIFIED by this Opinion and Order, still DISMISSING the appeal as outside the Board's jurisdiction.

BACKGROUND

On the morning of June 9, 1989, the appellant, who then occupied a position as an Alternate Board Member with the Department of Labor, Employees' Compensation Appeals Board (ECAB), submitted a Form CA-1, Federal Employee's Notice of Traumatic Injury, to Michael J. Walsh, the ECAB's Chairman. *See* Hearing Transcript (HT) at 25, 167. On the CA-1, the appellant claimed that she had experienced chest pain and a severe headache as a result of an incident on the previous day involving Alternate Board Member Willie T.C. Thomas. *Id.* at 159-62, 213-14, and 229. The relevant portion of the CA-1 stated as follows:

> At Board conference, Mr. Willie T.C. Thomas told me to "Eat it," that my problem was that I wasn't getting "fucked" and that I "sniffed around" the pregnant women because I am jealous. Also that I have a "fat ass."

See Initial Appeal File (IAF), Tab 1.

Mr. Thomas, who was in the room when the appellant submitted the CA-1, advised Walsh in a memorandum that Walsh "may find it necessary to look further into the cause and reasons that led to the argument" in order to assist the Office of Workers' Compensation Programs in deciding whether the incident arose within the performance of the appellant's duty. HT at 32. Mr. Walsh subsequently obtained statements from ECAB members and agency employees regarding other incidents involving the appellant. *Id.* at 43-67. Based on the content of those statements, Walsh transmitted the collected material on July 18, 1989, to Michael K. Wyatt, the

Associate Deputy Secretary of Labor. *See id.* at 107-10. Mr. Wyatt reviewed the material and spoke with the appellant about the allegations contained therein. *Id.* at 118-27.

Wyatt ultimately decided to reassign the appellant to another position. *Id.* at 137-41. Effective January 8, 1990, the agency temporarily reassigned the appellant from the position of Alternate Board Member, GS-905-15, to the position of Attorney-Advisor, GS-905-15.[1] IAF, Tab 1. On April 3, 1990, the appellant filed a complaint with the Office of Special Counsel (OSC) alleging reprisal for whistleblowing and for exercising an appeal right. *Id.*, Tab 5, Subtab 3 and Tab 8. On May 11, 1990, while the Special Counsel's investigation was pending, the appellant filed a formal equal employment opportunity complaint alleging discrimination based on sex and citing specifically the June 8, 1989, incident with Mr. Thomas. *Id.*, Tab 5, Subtab 4a. On July 9, 1990, the Office of Special Counsel notified the appellant that it had found no evidence of reprisal for any disclosure and was terminating its investigation. *Id.*, Tab 5, Subtab 3. The appellant filed a timely Individual Right of Action (IRA)

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[1] The appellant characterizes the agency's action as a removal. The SF 50-B documenting the action states that the action was a reassignment not to extend beyond May 8, 1990. IAF, Tab 5, Subtab 4d. Effective May 9, 1990, the agency extended the reassignment to September 6, 1990. *Id.*, Tab 5, Subtab 4b. The agency has permanently assigned the appellant to an Attorney-Advisor position. *See* Brief of Petitioner, No. 92-3169, at 15. We find that the agency's action constituted a reassignment that did not result in a reduction in either the appellant's grade or pay. *See Peery v. Department of the Navy*, 40 M.S.P.R. 377, 379 (1989).

appeal with the Board's Washington, D.C., Regional Office asserting that the CA-1 contained disclosures of sexual harassment, gross mismanagement, and an abuse of authority which constituted protected disclosures under the Whistleblower Protection Act of 1989 (WPA) that resulted in her reassignment. *Id.*, Tab 1.

In his November 9, 1990, initial decision, the administrative judge found that the Board had jurisdiction over this IRA appeal under 5 U.S.C. §§ 1221(a) and 1214(a)(3). Initial Decision at 2. He also found that the CA-1 contained an allegation of sexual harassment constituting a protected disclosure under 5 U.S.C. § 2302(b)(8).[2] *Id.* at 5-6. However, he denied the appellant's request for corrective action on the ground that she failed to establish that her disclosure was a contributing factor in the agency's action. *Id.* at 7-11. In a November 25, 1991, Opinion and Order, the Board vacated the initial decision and dismissed the appeal for lack of jurisdiction, concluding that the filing of a Form CA-1 does not constitute whistleblowing under 5 U.S.C. § 2302(b)(8), but, rather, the exercise of an appeal right under section 2302(b)(9). *See Von Kelsch v. Department*

[2] The appellant contended that her contact with the agency's EEO office constituted whistleblowing that was a contributing factor in the agency's action. *See*, IAF, Tab 21 at 13-14. The administrative judge properly rejected this argument during a prehearing telephonic conference on the ground that the appellant failed to raise that assertion in her complaint to the OSC. *See id.*, Tab 25; *Ward v. Merit Systems Protection Board*, 981 F.2d 521, 526 (Fed. Cir. 1992) (Board properly refused to consider an issue that the employee failed to raise before the Special Counsel).

of Labor, 51 M.S.P.R. 378 (1991). The appellant then filed an appeal with the U.S. Court of Appeals for the Federal Circuit. The court has now remanded the case to us for a reconsideration of the November 25, 1991, Opinion.

ANALYSIS

In 1989, Congress enacted the WPA, Pub.L. No. 101-12, 103 Stat. 16, presently codified at various sections of Title 5 of the United States Code. Under section 2302(b)(8) of Title 5 of the Code, an agency is prohibited from taking, failing to take, or threatening to take a personnel action with respect to any employee because of a disclosure of information by the employee, which the employee reasonably believes evidences: (1) A violation of a law, rule, or regulation; or (2) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. *See Christopher v. Defense Logistics Agency*, 44 M.S.P.R. 264, 271 (1990).

In enacting section 1221 of Title 5 of the Code, Congress created an additional statutory right of appeal to the Board called an individual right of action (IRA) whereby an employee who alleges that a prohibited personnel practice resulted from a protected disclosure can seek stays and corrective action directly from the Board without the involvement of the OSC. *See* 5 U.S.C. § 1221(a) and (c). Section 1221, however, provides for the filing of an IRA appeal only where the reprisal is a result of a prohibited personnel practice described in 5 U.S.C. § 2302(b)(8). *See* 5 U.S.C. § 1221(a)

and (e)(1); *Doster v. Department of the Army*, 56 M.S.P.R. 251, 254 (1993). Thus, for the Board to have jurisdiction over the appellant's IRA appeal, her alleged whistleblowing activity must be protected under section 2302(b)(8). *See, e.g., Shaw v. Department of the Navy*, 39 M.S.P.R. 586, 588 (1989) (the Board will not act where it lacks statutory or regulatory authority). Moreover, the appellant must prove by preponderant evidence that she made a disclosure described in 5 U.S.C. § 2302(b)(8). *See Braga v. Department of the Army*, 54 M.S.P.R. 392, 397 (1992).

In *Williams v. Department of Defense*, 46 M.S.P.R. 549 (1991), the Board concluded that the filing of an equal employment opportunity (EEO) complaint does not constitute whistleblowing under section 2302(b)(8), but rather the exercise of an appeal, complaint, or grievance right granted by law, rule, or regulation protected under 5 U.S.C. § 2302(b)(9). The Board noted that the filing of an EEO complaint suggests a different type of activity than a "disclosure of information" protected under section 2302(b)(8). *Id.* The U.S. Court of Appeals for the Federal Circuit also has held that the Board lacks jurisdiction over an IRA appeal brought by a Federal employee who alleges reprisal for filing an EEO complaint because such an allegation falls exclusively within section 2302(b)(9). *Spruill v. Merit Systems Protection Board*, 978 F.2d 679, 686-92 (Fed. Cir. 1992) (because the issue on appeal was solely jurisdictional, the Board was the proper party

respondent; Board correctly dismissed the petition for lack of subject-matter jurisdiction). The court noted that even though the Board did not have jurisdiction over the whistleblowing claim, investigative and remedial measures nevertheless were available to the employee through the Equal Employment Opportunity Commission (EEOC). 978 F.2d at 692.

Similarly, filing an appeal with the Merit Systems Protection Board, availing oneself of a union grievance procedure, or lodging an Unfair Labor Practice (ULP) complaint with the Federal Labor Relations Authority (FLRA) do not constitute protected disclosures under 5 U.S.C. § 2302(b)(8), but, rather, activities protected from reprisal by section 2302(b)(9). *See Ruffin v. Department of the Army*, 48 M.S.P.R. 74, 79 (1991) (filing of an appeal to the Board does not constitute whistleblowing under section 2302(b)(8)); *Crist v. Department of the Navy*, 50 M.S.P.R. 35, 38 (1991) (filing of a grievance does not constitute whistleblowing under section 2302(b)(8)); *Coffer v. Department of the Navy*, 50 M.S.P.R. 54, 56-57 (1991) (filing of a ULP complaint does not constitute whistleblowing under section 2302(b)(8)). Because those activities constitute the initial steps toward taking legal action against an employer for the perceived violation of an employee's rights, they differ from the "disclosure of information" protected by section 2302(b)(8). *Williams*, 46 M.S.P.R. at 553.

In the instant appeal, the appellant alleges that the agency retaliated against her for submitting a CA-1 Notice of

Traumatic Injury to her supervisor. An employee who files a Form CA-1 is exercising his or her right to file a "claim" for "payment of compensation" under the Federal Employees' Compensation Act (FECA). *See* 5 U.S.C. §§ 8121 and 8124. In adjudicating a FECA claim, the Office of Workers' Compensation Programs (OWCP) determines whether the claimant has provided sufficient evidence of a nexus between the injury and her course of employment and, if so, the amount and kind of compensation to be awarded. *See Anderson v. United States*, 16 Cl.Ct. 546, 548 (1989). The OWCP is not empowered to grant relief for any underlying personnel practices that may have led to the injury. *See, e.g., Weyerhaeuser Steamship Co. v. United States*, 372 U.S. 597, 601, 83 S.Ct. 926, 928-29 (1963) (FECA statutory scheme provides right of relief for work-related injury and is not concerned with other rights or liabilities).

Comparing the nature and scope of a FECA claim with, for example, an appeal to the Board, a complaint filed with the EEOC, an Unfair Labor Practice complaint, or a grievance, we conclude that the submission of a FECA claim for compensation for a work-related injury does not constitute an initial step toward taking legal action against an employer for the perceived violation of an employee's rights. *See Williams*, 46 M.S.P.R. at 553. Accordingly, we find that the filing of a CA-1 is not the "exercise of any appeal, complaint, or grievance right" within the terms of 5 U.S.C. § 2302(b)(9) and could, under the appropriate circumstances, constitute

whistleblowing under section 2302(b)(8). However, although we conclude that the Board does not lack jurisdiction to hear and decide an IRA appeal simply because the disclosure is made in a FECA claim, the nature of the disclosure may nonetheless divest the Board of jurisdiction over the appeal.

Under 5 U.S.C. § 2302(b)(1)(A), an agency employee is prohibited from taking, directing others to take, recommending, or approving any personnel action against another employee on the basis of sex as prohibited under section 717 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16.[3] Discrimination based on sex includes sexual harassment, including allegations of offensive sexually related conduct that creates an intimidating, hostile, or offensive working environment. *See Downes v. Federal Aviation Administration*, 775 F.2d 288, 290-93 (Fed. Cir. 1985). A claim of "hostile environment" sexual harassment is a recognized unlawful employment practice proscribed by Title VII. *See Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65-67, 106 S.Ct. 2399, 2405-06, 91 L.Ed.2d 49 (1986).

In *Parnell v. Department of the Army*, MSPB Docket No. CH0351910431M1 (June 7, 1993), the Board stated that a claim of reprisal for filing a discrimination complaint is cognizable under 5 U.S.C. § 2302(b)(1). *See id.*, slip op. at 6. In arriving at this conclusion, the Board noted that

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[3] Section 2302(b)(1)(A) also prohibits taking, directing others to take, recommending, or approving a personnel action on the basis of race, color, religion, or national origin. 5 U.S.C. § 2302(b)(1)(A).

the United States Court of Appeals for the Federal Circuit seemingly has endorsed the Board's position that a claim of reprisal for EEO activities sets forth a cognizable claim under section 2302(b)(1)(A), as well as under section 2302(b)(9), and that courts in general have interpreted 42 U.S.C. § 2000e-16, referenced in section 2302(b)(1), as including claims of reprisal for opposition to employment practices made unlawful by Title VII. *See id.* at 4-5.

The history and structure of the WPA indicates Congress' intent not to extend IRA appeal protection under section 2302(b)(8) to employees who allege reprisal for opposition to practices made unlawful by Title VII. *See Spruill*, 978 F.2d at 691-92. In creating an IRA appeal right under section 2302(b)(8), Congress expressed its intent to benefit those employees whose "only route of appeal [under the then-existing statute] is the OSC." S.Rep. No. 413, 100th Cong., 2d. Sess. 32. At the time Congress enacted the WPA, however, employees who alleged reprisal for opposition to sexual harassment had a right of appeal to the EEOC under Title VII in addition to any complaint they elected to file with the Office of Special Counsel. *See* 42 U.S.C. § 2000e-16 (protection of Title VII extended to Federal employees under section 717 of the Civil Rights Act of 1964 by virtue of the Equal Employment Opportunity Act of 1972); *In re Frazier*, 1 M.S.P.R. 163, 191 n.36 (1979), *aff'd sub nom. Frazier v. Merit Systems Protection Board*, 672 F.2d 150 (D.C. Cir. 1982).

The appellant in the present case claims that her FECA claim discloses sexual harassment in the form of sexually offensive conduct resulting in a hostile or offensive working environment and that the disclosure was a contributing factor in her reassignment. *See* HT at 225-28; IAF, Tab 1. We find that the appellant's disclosure of what she believed to be sexual harassment was an activity protected against reprisal by 5 U.S.C. § 2302(b)(1)(A),[4] and that Congress did not intend to include under section 2302(b)(8) matters prohibited under section 2302(b)(1)(A).[5] *See Spruill*, 978 F.2d at 692 (the types of disclosures protected under section 2302(b)(8) do not include "the results of an individual's complaint about the discriminatory behavior of a particular supervisor"); *Williams*, 46 M.S.P.R. at 553 (the wording in section 2302(b)(8) regarding the protection of "a disclosure of

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[4] In *Marren v. Department of Justice*, 51 M.S.P.R. 632 (1991), *aff'd*, 980 F.2d 745 (Fed. Cir. 1992) (Table), the appellant alleged handicap discrimination. The Board's jurisdiction over the IRA appeal in that case was not at issue. *See* 51 M.S.P.R. at 636. Rather, the Board held that it has no authority to review discrimination claims raised in IRA appeals. *See id.* at 642. Accordingly, the Board did not decide whether retaliation for a disclosure of handicap discrimination falls within 5 U.S.C. § 2302(b)(1)(D) or 5 U.S.C. § 2302(b)(8). We need not decide that question here, however, because the appellant does not allege discrimination as a result of a handicap.

[5] In *In re Frazier*, the Board treated disclosures regarding the manner in which the agency had handled some EEO complaints as whistleblowing activity. *See* 1 M.S.P.R. at 185-87. That case, however, involved other disclosures of mismanagement and abuse of authority as well, and the Board did not consider whether matters prohibited under 5 U.S.C. § 2302(b)(1)(A) should be excluded from 5 U.S.C. § 2302(b)(8), which is the issue now before us.

information" suggests an activity not necessarily based on a personal grievance that is actionable as an EEO complaint). In addition, this interpretation of the statute comports with Congress' efforts to preserve the EEOC's "continuing leadership role in the ongoing battle to eradicate discrimination." *Spruill*, 978 F.2d at 692.

Accordingly, we conclude that the Board does not have jurisdiction over the appellant's IRA appeal. *See Spruill*, 978 F.2d at 692 (IRA appeal properly dismissed for lack of subject-matter jurisdiction where appellant alleges a disclosure that does not fall under section 2302(b)(8)); *Booker v. U.S. Postal Service*, 53 M.S.P.R. 507, 509 (allegations of prohibited personnel practices under 5 U.S.C. §§ 2302(b)(1) and (b)(9) are not an independent source of Board jurisdiction), *aff'd*, 982 F.2d 517 (Fed. Cir. 1992) (Table).

The appellant also contended at various times during her appeal that her CA-1 disclosed gross mismanagement and abuse of authority in that Mr. Walsh allegedly was passive and silent throughout the incident with Mr. Thomas. *See* IAF, Tab 5, Subtab 4a. To the extent that this allegation is part of the appellant's claim of reprisal for disclosure of sexual harassment, it does not vest jurisdiction in the Board. Even assuming that the Board has jurisdiction to consider the appellant's allegation of gross mismanagement and abuse of authority, the CA-1 on its face does not charge Mr. Walsh with wrongdoing nor does it mention his actions during the incident

with Mr. Thomas.[6] Because the appellant's remarks on the CA-1 do not reference the statutory requirement of "gross mismanagement" or "abuse of authority" covered under 5 U.S.C. § 2302(b)(8), we find that the appellant has failed to show that she engaged in any protected whistleblowing activity. *See Ward v. Merit Systems Protection Board*, 981 F.2d 521, 525-26 (Fed. Cir. 1992); *Burrowes v. Department of the Interior*, 54 M.S.P.R. 547, 552 (1992). Thus, we would still dismiss her IRA appeal for lack of jurisdiction. *See Padilla v. Department of the Air Force*, 55 M.S.P.R. 540, 542-44 (1992) (appeal properly dismissed for lack of jurisdiction where appellant's comments did not set forth allegations of gross mismanagement or an abuse of authority).

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See*

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[6] The administrative judge found that the CA-1 did not set forth allegations of gross mismanagement or abuse of authority, *see* Initial Decision at 6, and the appellant does not challenge that finding on petition for review. Furthermore, we note that in her brief to the Federal Circuit, the appellant alleged only that the CA-1 contained disclosures of sexual harassment; she did not aver that the form contained allegations of mismanagement or abuse of authority. *See* Brief of Petitioner, No. 92-3169, at 2, 17-18, 21, and 35.

5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.